

October 24, 2022

The Honorable Denis McDonough
Secretary
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

Re: RIN 2900-AQ59—Health Care Professionals Practicing Via Telehealth

Dear Secretary McDonough:

On behalf of the physician and medical student members of the American Medical Association (AMA), I am writing to provide comments on the Department of Veterans Affairs (VA) Proposed Rule, “RIN 2900-AQ59—Health Care Professionals Practicing Via Telehealth.”¹ The VA is proposing modifications to the definition of a covered health care professionals, including trainees, who provide health care services via telehealth. Importantly, these modifications are limited to health care professionals and health professions trainees who are employed by the VA, and would not apply to contracted health care professionals. The AMA is strongly committed to helping the VA ensure the comprehensive delivery of, and timely access to, quality primary and specialty health care services for our nation’s veterans. As we have communicated previously, the AMA supports applying proposals such as this to health care professionals who are VA employees while continuing to adhere to current state-based oversight of non-VA employees who provide health care services in the community under contract. The AMA also strongly supports providing veterans with access to health care services via telehealth but believes that the VA should consider the potential impact on care quality within any proposal that would expand scope under the Federal Supremacy Project for health care services provided via telehealth.

Health care trainees should be appropriately supervised when providing telehealth care.

The William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (2021 NDAA) changed the definition of health care professional and expanded it by including postgraduate health care employees and health professions trainees.² As such, the proposed rule is attempting to align VA policy with the NDAA by allowing post graduate health care employees and health professions trainees to provide care via telehealth. These health professions trainees work as apprentices within the VA and are not required to have a license, registration, certification, or meet other state requirements. However, per the proposed rule, the trainees would have to be supervised when providing telehealth services. **The AMA agrees with the organizations that submitted comments urging the VA to require that health professions trainees be supervised by appropriately licensed health professionals, and we support the proposed rule’s supervision requirement.** Moreover, we urge the VA to ensure that the proper level of supervision is provided to these trainees. Presently, there are three

¹ <https://www.federalregister.gov/documents/2022/08/23/2022-18033/health-care-professionals-practicing-via-telehealth>.

² <https://www.govinfo.gov/content/pkg/PLAW-116publ283/pdf/PLAW-116publ283.pdf>.

acknowledged levels of supervision: (1) general, (2) direct, and (3) personal.³ General supervision requires the procedure to be furnished under the physician's overall direction and control. Direct supervision varies depending on location and the service being provided, but typically requires that a physician be present in the location where the service is being performed and is available for immediate assistance and direction. Personal supervision entails the physician being physically present in the room during the procedure.⁴ Though the AMA supports allowing "direct supervision" to include immediate availability through the virtual presence of the supervising physician using real-time, interactive audio/video communications technology, it does not change the need to ensure that the proper level of supervision is administered, especially to VA trainees.

VA contractors should still be required to adhere to state licensure and scope requirements.

The VA has not authorized any contracted physician or other health care professional who is not directly employed by the VA to provide health care services via telehealth unless the contracted physician or other health care professional is licensed in accordance with the laws of the state where the VA patient is located. The AMA understands that the telehealth expansion in the current proposal is limited to health professionals and health professions trainees who are employed by the VA. **The AMA strongly supports this important distinction—contracted physicians, other health care professionals, and health professions trainees will continue to be subject to state licensing and oversight of quality, patient safety, training, and other standards set by the states in which they are licensed.**

The AMA supports the VA contracting with non-VA-employed physicians or other health care professionals to provide health care services to VA patients via telehealth outside a VA facility. However, just as it is in the case of a contracted physician providing health care services to a VA patient in person, a contracted physician providing health care services via telemedicine must also be licensed in the state where the VA patient is being treated. This structure of accountability provides protections for VA patients receiving health care services outside a VA facility, whether in person or via telehealth, by ensuring that the appropriate licensing boards have authority over the contracted physician or other health care professional in the state where the patient is located. Without such protections, should VA patients be subject to services that fall short of the standard of care, they would have limited recourse or opportunity to seek redress and relief under their own state's medical practice and patient safety laws and regulations.

In order to help ensure that the VA has enough contracted physicians to adequately provide telehealth services and still adhere to state licensure laws, the AMA has long advocated that state licensing boards and the Federation of State Medical Boards (FSMB) streamline and simplify the medical licensure process so that a physician already licensed in one state can more easily obtain a license in multiple states. The Interstate Medical Licensure Compact (Compact) makes this possible. Thirty-nine states are members of the Compact and others are considering membership.⁵ It expedites the licensing process and reduces the administrative barriers for physicians licensed in a member state to obtain a license to practice in other member states. The Compact is an important mechanism that allows physicians who contract with the VA to become quickly licensed in other states so that they can provide health care services via telehealth while ensuring that they are licensed in the state where the VA patient receives care.

³ <https://www.cms.gov/Outreach-and-Education/Medicare-LearningNetworkMLN/MLNMattersArticles/Downloads/MM11043.pdf>.

⁴ <https://www.law.cornell.edu/cfr/text/42/410.32>.

⁵ <https://www.imlcc.org/participating-states/>.

Increasing the use of telehealth within the VA is a positive step; however, the VA should consider how the Federal Supremacy Project could potentially impact the provision of telehealth services to ensure that veterans receive the highest quality of care.

“VHA’s total number of monthly telehealth episodes across all modalities tripled during the pandemic—from about 1.5 million episodes during February 2020, to a high of about 4.5 million episodes during April 2020.”⁶ Moreover, many VA health care appointments were switched to telehealth during COVID and remain that way today. With increased use of telehealth among veterans, many of whom have very complex medical issues, it is vitally important that we ensure that a high quality of care is provided via telehealth.

In previous rulemaking, the VA authorized physicians and other health care professionals who were employed directly by the VA and had at least one valid state license to provide telehealth services without regard to the location of the patient or the health professional. The proposed rule clarifies that the expanded definition of health care professionals within the VA have “the ability to provide telehealth services within their scope of practice, functional statement, and/or in accordance with privileges granted to them by VA, in any location, within any state, irrespective of the state or location within a state where the health care provider or the beneficiary is physically located.”⁷ The AMA supports the expanded use of telehealth, especially within the VA, where it will help to address the significant and unique needs of our nation’s veterans and will increase access to health care services for veterans being treated within the VA system. However, as telehealth expands, it is important to ensure that patient protections remain in place, including the direct oversight, accountability, training, and quality control of VA-employed physicians and other health care professionals.

Though the Administration has assured the AMA that the VA Federal Supremacy Project will not expand non-physician practitioners’ (NPPs) scope of practice within the VA, it is worth highlighting the potential harms of NPPs providing services that they are not trained or educated to provide.⁸ If, through the Federal Supremacy Project, NPPs inappropriately have their scope of practice expanded, these practitioners will likely be able to provide care beyond the scope of practice laws in the state where they are licensed and where the patient is located. As the VA expands who can provide care via telehealth, it is important for the VA to consider the potential implications of the Federal Supremacy Project on the care that NPPs will provide to veterans via telehealth.

Commentors have argued that “the care that is provided by VA must be of the highest quality, meaning from physicians who have been trained to practice independently, have proven their knowledge, clinical acumen, and skills, or, if not, are under the supervision of another physician who has.”⁹ The AMA agrees with these comments. Moreover, these comments align with a recent survey of U.S. voters where 95 percent said it is important for a physician to be involved in their diagnosis and treatment decisions.¹⁰ NPPs are an integral part of physician-led health care teams. However, the clinical judgment of an NPP cannot substitute for that of a physician, especially when it comes to diagnosing complex medical conditions, developing comprehensive treatment plans, ensuring that procedures are properly performed, and managing highly involved and complicated patient cases.¹¹

⁶ <https://www.gao.gov/assets/gao-21-265.pdf>.

⁷ <https://www.federalregister.gov/documents/2022/08/23/2022-18033/health-care-professionals-practicing-via-telehealth>.

⁸ <https://www.federalregister.gov/documents/2020/11/12/2020-24817/authority-of-va-professionals-to-practice-health-care#p-65>.

⁹ <https://www.federalregister.gov/documents/2022/08/23/2022-18033/health-care-professionals-practicing-via-telehealth>.

¹⁰ <https://www.ama-assn.org/system/files/scope-of-practice-protect-access-physician-led-care.pdf>.

¹¹ <https://www.ama-assn.org/system/files/scope-of-practice-physician-training.pdf>.

Multiple studies have shown that NPPs order up to 400 percent more diagnostic imaging than physicians, which increases health care costs and threatens patient safety by exposing patients to unnecessary radiation.¹² In addition, a recent study from the Hattiesburg Clinic in Mississippi found that allowing Nurse Practitioners (NPs) and Physician Assistants (PAs) to function with independent patient panels under physician supervision in the primary care setting resulted in higher costs, higher utilization of services, and lower quality of care compared to panels of patients with a primary care physician.¹³ Finally, a Mayo Clinic study compared the quality of physician referrals for patients with complex medical problems against referrals from NPs and PAs for patients with the same problems. Physician referrals were better articulated, better documented, better evaluated, better managed, and were more likely to be evaluated as medically necessary than NP or PA referrals, which were more likely to be evaluated as having little clinical value.¹⁴ These considerations are especially important within the VA since this system provides multifaceted medical care to veterans, including those with traumatic brain injuries and other serious medical and mental health issues. As numerous health care changes are made within the VA it is important to consider how these changes will interact with one another to ensure that our nation's veterans receive high quality telehealth care, which the AMA believes means telehealth care that is administered as part of a physician-led team.

Moreover, as the VA looks to expand the individuals it considers health care professionals, the VA should ensure that there is an appropriate expansion of oversight and supervision of these NPPs and trainees. According to multiple Government Accountability Office (GAO) audits, the VA is doing an inadequate job of supervising and disciplining its NPPs. Over the past few years, the VA Office of Inspector General has reported multiple cases of quality and safety concerns regarding VA providers.¹⁵ The issues reported range from providers lacking appropriate qualifications, to poor performance and provider misconduct.¹⁶ Unfortunately, the VA has been deficient in putting an end to this subpar care in part, due to the fact that VA medical center officials lack the information they need to make decisions about providers' privileges due to poor VA reporting. Owing to the VA's inadequate oversight, VA medical center officials are not reviewing all the providers for whom clinical care concerns were raised, and the VA is not taking appropriate adverse privileging actions.¹⁷ This includes certain VA medical centers not reporting providers to state licensing boards as is required by law.¹⁸ As the VA alters and expands its telehealth it should consider the patient safety issues that will accompany these changes and ensure that proper oversight of providers is administered.

When receiving care via telehealth, our nation's veterans deserve the highest quality of care possible. The AMA therefore supports the overall goal of the proposed rule—to ensure greater access to telehealth for veterans. However, the AMA urges the VA to consider the implications of the Federal Supremacy Project and how the potential expansion of NPPs scope of practice through this initiative will impact the care provided to veterans via telehealth.

¹² D.J. Mizrahi, et.al. "National Trends in the Utilization of Skeletal Radiography," *Journal of the American College of Radiology* 2018; 1408-1414.

¹³ <https://ejournal.msmaonline.com/publication/?m=63060&i=735364&view=contentsBrowser>.

¹⁴ Lohr RH, West CP, Beliveau M, et al. Comparison of the Quality of Patient Referrals from Physicians, Physician Assistants, and Nurse Practitioners. *Mayo Clinic Proceedings*. 2013;88:1266-1271.

¹⁵ <https://www.gao.gov/assets/710/702090.pdf>.

¹⁶ <https://www.gao.gov/assets/710/702090.pdf>.

¹⁷ *Id.*

¹⁸ *Id.*

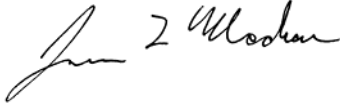
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Thank you for considering the AMA's comments. If you have any questions, please feel free to contact Margaret Garikes, Vice President, Federal Affairs, at margaret.garikes@ama-assn.org or 202-789-7409.

Sincerely,

A handwritten signature in cursive script that reads "Jim L Madara". The signature is written in black ink and is positioned above the printed name.

James L. Madara, MD